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No. 74-735

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,

Respondent,

vs.

CHARLES G. NICKELS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH FEDERAL CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1974

NO.

UNITED STATES OF AMERICA,
Respondent,

vs.

CHARLES G. NICKELS,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH FEDERAL CIRCUIT

Petitioner Charles G. Nickels, defendant-appellee in the court below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 502 F.2d 1173 (1974). A copy of this opinion is set forth in Appendix 1.

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JURISDICTION

The opinion and judgment of the Court of Appeals for the Seventh Circuit was entered on September 12, 1974. A petition for rehearing was denied on November 1, 1974 (Appendix 2), and the judgment became final on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Was the denial of the opportunity to present to the jury the circumstances surrounding petitioner's grand jury testimony, offered to negative the requisite specific intent and to establish a defense of duress, improper?

2. May the government, through acts of omission and affirmative misstatements, attempt to procure false testimony under oath?

STATEMENT OF THE CASE

Petitioner was indicted on May 31, 1973. The indictment (set forth in full in Appendix 3) charged Mr. Nickels in one count with having made a material false declaration before a federal grand jury, in violation of 18 U.S.C. §1623. The facts preceding the indictment, which form the basis for the two questions raised here, are as follows:

Petitioner was a member of the Chicago Police Department from 1959 until 1974. Mr. Nickels served in the 18th Chicago Police District from January, 1965, to May, 1966.

In August of 1972, Mr. Nickels was called to testify before a special federal grand jury. Prior to summoning Mr. Nickels to appear, the government had information that in 1964-65, several policemen had organized and operated a "protection package" for taverns within the 18th District. The government also had information that the organizer-policemen had disseminated monies to police members of the 18th District, including among the others,

to Mr. Nickels. The government also knew prior to petitioner's substantive testimony that Mr. Nickels had not been in the 18th District for over six years.

At the time Mr. Nickels testified, August 29, 1972, he was a fifty-one year old Sergeant on the Chicago Police Force, which provided the sole source of income and support for himself, his wife, his fifteen year old son, and his father. The government (as well as Mr. Nickels) knew that under a Chicago Police Department Rule ("Rule 51"),* petitioner would summarily lose his job for failing to appear or for appearing and refusing to testify through imposition of the Fifth Amendment. The government also knew that under the then five-year-old decision by this Court in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), Mr. Nickels' grand jury testimony could not later be used against him because of these coercive circumstances. Yet, despite the fact that Mr. Nickels was entitled to immunity for his statements (a point conceded throughout by the government), petitioner was falsely "informed" by the government that anything he said could be used against him in a subsequent criminal proceeding. (App. 25-26).**

Further, and despite knowing that petitioner had not consulted with legal counsel prior to testifying and was apparently entitled to appointed representation, the government did not inform Mr. Nickels that he would be the target of the questioning, did not warn him of the potential consequences of perjury even when the government indi-

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* The text of Rule 51 of the Rules and Regulations is set forth in Appendix 4. Subsequent to Mr. Nickels testifying, Rule 51 was challenged in the courts and ultimately declared constitutionally invalid to the extent that it denied police officers the privilege against self-incrimination where criminal prosecution might follow. *Confederation of Police* v. *Conlisk*, 489 F.2d 891, (7th Cir. 1973), *cert. denied*, ... U.S. ....., 94 S.Ct. 1971 (1974).

** The transcript of Mr. Nickels' grand jury testimony is set out in full in Appendix 9.

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cated it disbelieved his testimony, and did not inform him that the Statute of Limitations barred prosecution for any activities he may have engaged in while an 18th District Officer in 1964-65.

In January, 1974, the case was tried before a jury. Prior to trial, petitioner moved for the suppression of his grand jury testimony on the grounds that the government's sole purpose in calling petitioner to testify had been to induce Mr. Nickels to testify falsely (or, by petitioner's refusal to testify, to engender his removal from the Police Department). After hearing before the court, which included petitioner's testimony, the motion was denied.

After the conclusion of the government's case in chief, and outside the presence of the jury, petitioner attempted to raise the affirmative defense of duress (and co-extensively, to negate the requisite element of specific intent) offering five exhibits into evidence. These exhibits consisted of the text of Rule 51, excerpts from the government's formal answer to petitioner's previous motion to suppress his testimony (as admissions), and the text of this Court's majority opinion in *Garrity* v. *New Jersey,* 385 U.S. 493 (1967).* These exhibits were offered in support of the defense that Mr. Nickels was coerced and subjected to duress at the time he was before the grand jury and hence did not knowingly testify falsely. All five exhibits were denied on grounds of relevance.

Upon appeal, the Court of Appeals for the Seventh Circuit affirmed the conviction. (Appendix 1). On the first question presented here, the Court expressly disagreed with opinions from the Fifth and Sixth Federal Circuits, and distinguished this Court's opinion in *United States* v. *Knox,* 396 U.S. 77, 83 (1969). (Appendix 1). On November 1, 1974, rehearing was denied (Appendix 2), and the judgment became final.

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* The Exhibits are set forth in full in Appendices 4-8.

REASONS FOR GRANTING THE WRIT

The instant Seventh Circuit opinion places the Circuit in square conflict with the three Circuits which have most recently considered the question of under what circumstances a defendant may present evidence of duress to negate the requisite specific intent of the crime charged. Further, it is believed that the instant decision is in conflict with a previous decision of this Court on this very question. If not, the case clearly presents an important question of federal law which should be settled by this Court.

The Second Circuit has expressly held that the defendant has a right to raise circumstances of potential economic hardship in crimes of specific intent to negate such intent. *United States* v. *Barash,* 365 F.2d 395, 401-02 (2nd Cir. 1966), 412 F.2d 26, 30 (2nd Cir. 1969), *cert. denied,* 396 U.S. 832 (1969). The Fifth Circuit has also recognized the right of a defendant to submit such evidence to negative requisite specific intent. *United States* v. *Ramzy,* 446 F.2d 1184, 1186 (5th Cir. 1971), *cert. denied,* 404 U.S. 992 (1971); *United States* v. *Willoz,* 449 F.2d 1321, 1325 (5th Cir. 1971). Most recently, in a case similar to the one at hand, the Sixth Circuit expressly approved of the propriety of submitting such circumstances to the jury. *United States* v. *Lazaros,* 480 F.2d 174, 176 (6th Cir. 1973), *cert. denied,* 415 U.S. 914 (1974).

In *United States* v. *Knox,* 396 U.S. 77 (1969), this Court reviewed and reversed the dismissal of two counts of an indictment charging false statements on federal tax forms, where the defendant had successfully argued that admissions on the federal form would inculpate him under Texas wagering laws. In ruling that the issues as presented were untimely, the Court through Mr. Justice Harlan held (396 U.S. at 82-83):

> "Knox may have a defense to this prosecution under the traditional doctrine that a person is not criminally responsible for an act committed under duress. . . .

> The question whether Knox's predicament contains the seeds of a 'duress' defense, or perhaps whether his false statements were not made 'wilfully' as required by Sec. 1001, is one that must be determined initially at trial."

Despite the fact that petitioner's claim on appeal was that he had been denied the opportunity to raise this defense at trial, and that this Court had, we believe, clearly dictated the propriety of such procedure, the Seventh Circuit distinguished *Knox* on the basis that "the Court there explicitly refused to decide the duress issue." 502 F.2d at 1177. (App. 6).

Ordinarily, a grand jury witness has three options: to assert the Fifth Amendment, to tell the truth, or to lie. Petitioner, however, was not an ordinary grand jury witness, owing to his employment with the Chicago Police Department and the existence of Police Department Rule 51 (Appendix 4). As Mr. Nickels testified at the pre-trial hearing, he was aware that assertion of the Fifth Amendment meant automatic job loss under Rule 51. Mr. Nickels also believed that to tell the truth meant to provide potentially incriminating information which might later be used against him. Mr. Nickels was not aware that his grand jury testimony could not be used against him in any future substantive criminal proceeding under this Court's decision in *Garrity* v. *New Jersey*, 385 U.S. 496 (1967).* And having not previously consulted with an attorney, and believing he could not afford one, Mr. Nickels had only the prosecutor's statements to rely upon. Despite the *Garrity* decision, the prosecutor reinforced Mr. Nickels' erroneous belief by misadvising him that anything he

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* Court decisions subsequent to *Garrity* have held that a grand jury witness who appears under coercive Fifth Amendment circumstances as those here is entitled to use immunity for his testimony. *See, e.g., Uniformed Sanitation Men Ass'n., Inc.* v. *Commissioner of Sanitation*, 426 F.2d 619, 626-27 (2nd Cir. 1970), *cert. denied*, 406 U.S. 961 (1972) and cases cited therein.

said could be used against him in subsequent criminal proceedings.

Mr. Nickels' police employment provided the sole support for his family. Like the defendants in *Garrity*, Mr. Nickels was "between the rock and the whirlpool", *but only because, contrary to Garrity, the prosecutors lied to him about the potential peril of incriminating statements.* It is clear from Mr. Nickels' pretrial testimony that had he been properly advised as to the state of the law, he would have chosen the "safe" alternative of the truth.

We believe it clear that the prosecutors called Mr. Nickels with an eye towards inducing him to submit false testimony. Despite their knowledge of Rule 51, they advised him that he had unfettered access to the Fifth Amendment. Though Nickels was beyond prosecution by the statute of limitations, he was treated as a target; he was given no indication of why he was called; he was not, unlike other policemen, previously interviewed; and he was the primary focus of all of the substantive questioning.* Indeed, when petitioner informed the prosecutors that he had not consulted with counsel prior to appearing and stated that he did not know if he could afford an attorney, the prosecutor immediately asked if he was willing to testify without one. (App. 26-27). Again, both prosecutor and witness were aware of Rule 51; petitioner believed that even a temporary "refusal to testify" would result in immediate job loss, and he responded affirmatively.

The government could have defused petitioner's apprehension in numerous ways:

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* It is evident from the transcript of Mr. Nickels' grand jury testimony (Appendix 9) that the prosecutors already had the answers to their questions before asking them; indeed, after supplying the correct answers to a number of questions (*e.g.*, "Joe Mazer" at App. 30; "McShane" corrected to "Dushane" at App. 33), Mr. Nickels was hypothetically "told" that the government had information contrary to his answers. (App. 37)

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(1) most obviously, by simply telling Mr. Nickels the truth: that his statements could *not* later be used against him in a criminal proceeding;

(2) by interviewing Mr. Nickels prior to his testimony;

(3) by inquiring into his need for legal representation; or

(4) by informing him he was beyond prosecution due to expiration of the statute of limitations.

Petitioner has maintained throughout that the government's conduct here smacked of entrapment, denying him the fundamental fairness every defendant is entitled to from the government. In such situations, petitioner has argued, the grand jury testimony should be suppressed. *United States* v. *Mandujano*, 496 F.2d 1050 (5th Cir. 1974); *United States* v. *Rangel*, 496 F.2d 1059 (5th Cir. 1974), *cert. denied*, ... U.S. ....., 42 U.S.L.W. 3631 (1974); *Brown* v. *United States*, 245 F.2d 549 (8th Cir. 1957); *United States* v. *Thayer*, 214 F. Supp. 929, 932 (Colo. 1963); *cf*, *United States* v. *Russell*, 411 U.S. 423, 431 (1973); *Lopez* v. *United States*, 373 U.S. 427, 434 (1963). At minimum, however, the "rock and the whirlpool" dilemma facing petitioner should have been admissible to the jury as forming "the seeds of a 'duress' defense," (*United States* v. *Knox*, 396 U.S. at 82-83), and co-extensively, to negate the specific element of the crime charged.

It is respectfully submitted that the judgment below conflicts with the decision of this Court in *United States* v. *Knox*, 396 U.S. 77 (1969), and is in acknowledged conflict with decisions of the Second, Fifth, and Sixth Circuits. *United States* v. *Barash*, 365 F.2d 395, 401-02 (2d Cir. 1966), 412 F.2d 26, 30 (2d Cir. 1969), *cert. denied*, 396 U.S. 832 (1969); *United States* v. *Ramzy*, 446 F.2d 1184, 1186 (5th Cir. 1971), *cert. denied*, 404 U.S. 992 (1971); *United States* v. *Willoz*, 449 F.2d 1321, 1325 (5th Cir. 1971); *United States* v. *Lazaros*, 480 F.2d 174, 176 (6th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974). A full review on the merits by this Court would alleviate this conflict, and clarify the federal law on this important issue.

CONCLUSION

For the reasons set forth above, petitioner Charles G. Nickels prays that this Court grant a writ of certiorari to review the judgment of the trial court and of the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX 1

Opinion—United States Court of Appeals For The Seventh Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 74-1153

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CHARLES G. NICKELS,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois,
Eastern Division.
No. 73 CR 400
RICHARD B. AUSTIN, *Judge*

ARGUED JUNE 6, 1974—DECIDED SEPTEMBER 12, 1974

Before CLARK, *Associate Justice,*[1] CUMMINGS, *Circuit Judge,* and BEAMER, *Chief District Judge.*[2]

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[1] Associate Justice Tom C. Clark of the Supreme Court of the United States (Ret.) is sitting by designation.

[2] Chief Judge George N. Beamer, United States District Court, Northern District of Indiana, is sitting by designation.

CUMMINGS, *Circuit Judge.* Defendant, a Chicago police officer, was convicted by a jury for making a false declaration before a grand jury in violation of 18 U.S.C. § 1623. He received an 18-month sentence.

According to the one-count indictment, defendant told the grand jury in substance that while in the performance of his duties as a Chicago police officer, he had never received any money from any persons, whereas in truth he had received money from Joseph Dawson and John Cello between January 1965 and May 1966 while in the performance of such duties.

In 1964, defendant was assigned to the 18th Chicago Police District Vice Squad to conduct wire surveillance. He remained there until the spring of 1966. At the trial, a former Chicago policeman, Joseph Dawson, and suspended policeman John Cello testified that defendant was given a share of monthly payoffs given to Dawson and Cello by gambling interests and tavern keepers. The division of the payoffs took place in secrecy in defendant's presence at the Olympic Hotel in Chicago on several occasions. The "package" was divided among the sixteen members of the Vice Squad. Martin B. Brody, keeper of the Olympic Hotel, testified that he gave a police officer $75 in the defendant's presence "to keep the vice squad away." He also testified that he gave defendant $75 on another occasion.

I

Defendant first argues that his grand jury testimony should have been suppressed because it was given under the duress of Rule 51 of the Chicago Police Department prohibiting officers from failing to give evidence before a grand jury. On the basis of prior Supreme Court de-

cisions, we held Rule 51 constitutionally invalid because it denied police officers the privilege against self-incrimination where criminal prosecution may have followed. *Confederation of Police* v. *Conlisk,* 489 F.2d 891 (7th Cir. 1973). Subsequently, we held that even in the face of such a rule a public employee is not privileged to lie before a grand jury, stating:

> "We find no reason or justification for extending this umbrella of [Fifth Amendment] protection to shield a witness against prosecution for knowingly giving false testimony." *United States* v. *Devitt,* ..... F.2d .... (7th Cir. 73-1691, July 2, 1974), *slip op.* 11.

To the same effect, see *United States* v. *Pacente,* ..... F. 2d ....., ... (7th Cir. 72-1988 *en banc,* August 6, 1974), *slip op.* 8-9; *United States* ex rel. *Annunziato* v. *Deegan,* 440 F.2d 304, 306 (2d Cir. 1971); cf. *United States* v. *Knox,* 396 U.S. 77; *United States* v. *Cooper,* 493 F.2d 473, 474 (5th Cir. 1974).

Defendant complains that no agent of the federal government interviewed him prior to the time he appeared before the grand jury. There is no such requirement.

Defendant urges that the Government was not entitled to propound questions to the defendant before the grand jury concerning events prior to the five-year statute of limitations. The point is without merit because the grand jury's scope of inquiry is not limited to events which may result in criminal prosecution. *Devitt, supra, slip op.* 7; *United States* v. *Cohn,* 452 F. 2d 881, 883 (2d Cir. 1971), certiorari denied, 405 U.S. 975.

Defendant next contends that before he testified, the prosecutor wrongly advised him that anything he said could be used against him in subsequent criminal proceed-

ings. Although it reflects badly on the Government, such an over-warning is no defense to a perjury charge. Compare the erroneously required waiver in *United States* ex rel. *Annunziato* v. *Deegan,* 440 F.2d 304, 306 (2d Cir. 1971). The incorrect warning simply restated one horn of the dilemma which Rule 51 would have created if valid. While it probably made that apparent dilemma more salient to the witness, it does not change the nature of the witness' dilemma. Accordingly, the warning does not distinguish this case from *Devitt* and *Pacente.*

Although defendant states that the warnings required by *Miranda* v. *Arizona,* 384 U.S. 436, with respect to right to appointed counsel were inadequate, the transcript of the colloquy between the defendant and prosecutor before the grand jury shows that defendant was adequately informed about that right.

The Government's failure to advise Nickels that he was a potential defendant does not bar a perjury prosecution for false testimony before a grand jury. *United States* v. *DiGiovanni,* 397 F.2d 409, 412 (7th Cir. 1968), certiorari denied, 393 U.S. 924. Similarly, it was unnecessary to warn defendant of the potential for perjury. *United States* v. *Winter,* 348 F.2d 204, 210 (2d Cir. 1965), certiorari denied, 382 U.S. 955.

Defendant also argues that the Government's entire course of conduct discussed in this section of the opinion supports an inference that he was called before the grand jury for the purpose of procuring perjured testimony. Since the questions were material to the grand jury's investigation, we doubt that we can inquire into the motivation for asking them. Cf. *Devitt, slip op.* 7; *United States* v. *Lazaros,* 480 F.2d 174, 177 (6th Cir. 1973). But even if the questions were asked with the expectation of perjured

answers, defendant cannot complain. This is not an entrapment case. *Lazaros* at 178-179. It was defendant's predisposition to lie his way out of his difficulties that led to this crime. The Government did not solicit or encourage perjury; at most it created a situation in which perjury appeared expedient. This is not "so outrageous" as to bar prosecution. *United States* v. *Russell,* 411 U.S. 423, 431. To the extent *United States* v. *Mandujano,* 496 F.2d 1050 (5th Cir. 1974), and *United States* v. *Rangel,* 496 F.2d 1059 (5th Cir. 1974), are *contra,* we respectfully disagree.

II

Defendant offered five exhibits at the opening of his case-in-chief to show that his perjury before the grand jury had been committed under duress. These exhibits consisted of legal matters. Defendant first proffered Rule 51 of the Chicago Police Department, then three portions of the Government's answer to defendant's motion to quash, and finally the Supreme Court's opinion in *Garrity* v. *New Jersey,* 385 U.S. 493, holding that a State cannot use the threat of discharge to secure incriminating evidence against an employee. We have already held that compulsion of this nature does not justify a witness in testifying falsely, and the argument fares no better under the rubric of duress.

In any event, this Circuit follows the common law rule that duress is a defense only if the defendant reasonably feared immediate death or serious bodily injury which could be avoided only by committing the criminal act charged. *United States* v. *Stevison,* 471 F.2d 143, 147 (7th Cir. 1972), following *Shannon* v. *United States,* 76 F.2d 490, 493 (10th Cir. 1935) (collecting cases). Since defendant offered no evidence to support such a finding, the exhibits were properly excluded. We therefore disagree

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with the district court in *United States* v. *Lazaros,* affirmed on other grounds, 480 F.2d 174 (6th Cir. 1973), and with *United States* v. *Willoz,* 449 F.2d 1321, 1325 (5th Cir. 1971). Defendant relies heavily on *United States* v. *Knox,* 396 U.S. 77, 83, but the Court there explicitly refused to decide the duress issue. Attempts to evade the consequences of one legal proceeding, even if perceived as unjust, do not justify further crimes. *United States* v. *Birch,* 470 F.2d 808, 812-813 (4th Cir. 1972).

III

Defendant next argues that four of the questions and answers from his grand jury testimony were outside the indictment and an impermissible amendment thereto. The indictment alleged that defendant knowingly declared "*in substance*" before the grand jury that while in performance of his duties as a Chicago police officer, he had never received any money from any person (emphasis added). The four questions pertained to defendant's receipt of money from other persons, including police officers, while he was assigned to the 18th District, and negative answers were given. These questions and answers were clearly within the "in substance" allegation of the indictment and did not constitute an impermissible amendment. Cf. *United States* v. *Rook,* 424 F.2d 403, 405 (7th Cir. 1970), certiorari denied, 398 U.S. 966.

IV

Defendant urges that the district court erroneously allowed hotelkeeper Brody to give testimony concerning a $75 protection payment to the defendant. This testimony showed that the statement charged in paragraph 4 of the

indictment[3] was untrue, so that it did not constitute a fatal variance. The "any person" charge in paragraph 4 was not limited by paragraph 5, which charged that defendant's statements were false because he had taken money from Cello and Dawson. See *United States* v. *Marchisio*, 344 F.2d 653, 662 (2d Cir. 1965).

V

Defendant claims the district judge should not have refused to give his proposed instructions 14 and 15.[4]

In this connection, defendant first asserts that his negative answer to the question whether he received any money while in the 18th District from any bar owner, tavern owners or businessmen who ran an establishment that sold alcoholic beverages was literally true. We disagree. During the division of payoffs, Cello explained to Dawson and defendant which taverns had contributed payoffs to Cello. The "package" was then divided among these three and thirteen other policemen. Since Cello had testified that the payoffs he contributed to the pot came from tavern owners, the government proved that defendant's answer was false.

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[3] Paragraph 4 of the indictment charged:

"At the time and place aforesaid, defendant Charles G. Nickels, while under oath, knowingly did declare in substance before said Grand Jury with respect to the aforesaid material matter that while in the performance of his duties as a Chicago police officer, he had never received any money from *any person*." (Emphasis supplied.)

[4] Defendant's instruction 14 stated:

"The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry. You are instructed that if an answer is subject to an interpretation that it is literally truthful, it is not perjury, even if the answer is evasive, incomplete, misleading, or unresponsive."

Defendant's instruction 15 would have charged:

"You are instructed that if an answer is literally true it is not perjury."

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Defendant next asserts that his answer "No, sir, not for my duties" to the question whether he received any money from any persons while on official duty as a Chicago policeman was also literally true. But his initial response "No, sir" was directly responsive and false, so that the non-responsive attempted hedge which followed was not effective. *Bronston* v. *United States,* 409 U.S. 352, is of no avail because Bronston replied only to a question which was not asked. Every portion of Bronton's answer was both non-responsive and literally true, whereas the only responsive portion of this defendant's answer was false. Of course a witness may give an answer and then qualify it, but the qualification must also be responsive or it is irrelevant.

Since the evidence does not support the theory of the case embodied in defendant's instructions 14 and 15, the denial thereof by the trial judge was proper. *United States* v. *Kahn,* 472 F.2d 272, 285 (2d Cir. 1973), certiorari denied, 411 U.S. 982; *United States* v. *DiGiovanni,* 397 F. 2d 409, 413 (7th Cir. 1968), certiorari denied, 393 U.S. 924.

VI

Our perusal of the indictment satisfies us that it adequately informed defendant of the nature of the charge and of the materiality of the false statements. The indictment, together with the answers to the defendant's motion for a bill of particulars, contained sufficient specificity. *United States* v. *Rook,* 424 F.2d 403, 405 (7th Cir. 1970), certiorari denied, 398 U.S. 966.

The judgment of conviction is affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX 2

Order Denying Petition For Rehearing

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 1, 1974.

Before
Hon. TOM C. CLARK, *Associate Justice* (Ret.)
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. GEORGE N. BEAMER, *District Judge* *

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 74-1153 *vs.*

CHARLES G. NICKELS,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois,
Eastern Division.
No. 73 CR 400
RICHARD B. AUSTIN, *Judge.*

O R D E R

On consideration of the petition of the appellant, Charles G. Nickels, for a rehearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the appellant for a rehearing in the above-entitled appeal be, and the same is hereby denied.

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* Judge Beamer, sitting by designation, voted to deny the petition for rehearing before his October 21, 1974, death.

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APPENDIX 3

Indictment

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

vs.

CHARLES G. NICKELS

No. 73 CR 400

Violation:
Title 18, United States Code, Section 1623.

The SPECIAL FEBRUARY 1971 GRAND JURY charges:

1. On August 29, 1972, at Chicago, in the Northern District of Illinois, Eastern Division,

CHARLES G. NICKELS,

defendant herein, under oath as a witness before the SPECIAL FEBRUARY 1971 GRAND JURY of the United States of America, duly impaneled and sworn in the United States District Court for the Northern District of Illinois and inquiring for said District in a case then and there pending before the said Grand Jury, knowingly did make a false material declaration.

2. At the time and place aforesaid, the Grand Jury inquiring as aforesaid was conducting an investigation pertaining to possible violations of the criminal laws of the United States, to wit: among others, Sections 371 and 1951 of Title 18, United States Code.

3. During the course of the investigation by said Grand Jury it became and was a matter material for the said Grand Jury to determine whether the defendant Charles G. Nickels, while in the performance of his duties as a Chicago police officer, had ever accepted money from any person.

4. At the time and place aforesaid, defendant Charles G. Nickels, while under oath, knowingly did declare in substance before said Grand Jury with respect to the aforesaid material matter that while in the performance of his duties as a Chicago police officer, he had never received any money from any person.

5. The aforesaid declaration by defendant was false and known to him to be false in that between January of 1965 and May of 1966 while in the performance of his duties as a Chicago police officer, he received money from Joseph Dawson and John Cello;

In violation of Title 18, United States Code, Section 1623.

A TRUE BILL:

.....

Foreman

.....

United States Attorney

RBM:icg

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APPENDIX 4

Defendant's Exhibit 6

RULE 51

of the Rules and Regulations
of the Chicago Police Department

IV. Rules of Conduct.

In addition to the positive requirements of the foregoing sections, the following rules of conduct set forth expressly prohibited acts.

• • •

Rule 51. Failing to give evidence before the Grand Jury, Coroner's inquest, in court, or before any governmental administrative body, including the Police Board, when properly called upon to do so, or refusing to testify on the grounds that such testimony might incriminate the member, or refusing to sign a waiver of immunity when requested to do so by a superior officer.

APPENDIX 5

Defendant's Exhibit 7

"This Circuit recently held that Rule 51 of the Chicago Police Department is unconstitutional. *Confederation of Police* v. *Conlisk, Slip Op.* 73-1543 (7th Cir. Nov. 29, 1973). The substance of the holding in the *COP* case is that a public employer cannot release or suspend an employee from his employment simply because he has exercised his Fifth Amendment privilege against self-incrimination. This was not a novel holding, the United States Supreme Court having decided the identical issue several years ago. *Sanitation Men* v. *Sanitation Commissioner,* 392 U.S. 280 (1968); *Gardner* v. *Broderick,* 392 U.S. 273 (1968)."

Quoted from Government's
Answer to Defendant's
Motion to Quash the
Indictment, filed
January 8, 1974.

APPENDIX 6

Defendant's Exhibit 8

"[T]he United States Supreme Court has clearly held that if a witness makes incriminating statements under the compulsion of a regulation similar to Rule 51, such statements cannot be used against him in a subsequent criminal proceeding for a past crime. *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Spevack* v. *Klein,* 385 U.S. 511 (1967)."

Quoted from Government's
Answer to Defendant's
Motion to Quash the
Indictment, filed
January 8, 1974

APPENDIX 7

Defendant's Exhibit 9

"In the instant case, had Nickels admitted extorting money from bar owners during his Grand Jury testimony, those admissions could never have been used against him in a subsequent criminal prosecution for extortion . . ."

Quoted from Government's
Answer to Defendant's
Motion to Quash the
Indictment, at page 2
(Filed January 8, 1974)

APPENDIX 8

Defendant's Exhibit 10

GARRITY *v.* NEW JERSEY.
Syllabus.

GARRITY et al. *v.* NEW JERSEY.

Appeal From The Supreme Court of New Jersey.

No. 13. Argued November 10, 1966.—Decided January 16, 1967.

Appellants, police officers in certain New Jersey boroughs, were questioned during the course of a state investigation concerning alleged traffic ticket "fixing." Each officer was first warned that: anything he said might be used against him in a state criminal proceeding; he could refuse to answer if the disclosure would tend to incriminate him; if he refused to answer he would be subject to removal from office. The officers' answers to the questions were used over their objections in subsequent prosecutions, which resulted in their convictions. The State Supreme Court on appeal upheld the convictions despite the claim that the statements of the officers were coerced by reason of the fact that if they refused to answer they could, under the New Jersey forfeiture-of-office statute, lose their positions. That statute provides that a public employee shall be removed from office if he refuses to testify or answer any material question before any commission or body which has the right to inquire about matters relating to his office or employment on the ground that his answer may

incriminate him. On the ground that the only real issue in the case was the voluntariness of the statements, the State Supreme Court declined to pass upon the constitutionality of the statute, though the statute was considered relevant for the bearing it had on the voluntary character of the statements used to convict the officers. The officers appealed to this Court under 28 U.S.C. § 1257 (2) and the question of jurisdiction was postponed to a hearing on the merits. *Held:*

1. The forfeiture-of-office statute is too tangentially involved to satisfy the requirements of 28 U. S. C. § 1257 (2). The only bearing it had was whether, valid or not, the choice between being discharged under it for refusal to answer and self-incrimination rendered the statements products of coercion. The appeal is dismissed, the papers are treated as a petition for certiorari, and certiorari is granted. Pp. 495-496.

2. The threat of removal from public office under the forfeiture-of-office statute to induce the petitioners to forgo the privilege against self-incrimination secured by the Fourteenth Amendment rendered the resulting statements involuntary and therefore inadmissible in the state criminal proceedings. Pp. 496-500.

Defendant's Exhibit 10

OCTOBER TERM, 1966.

Opinion of the Court.

(a) The choice given petitioners either to forfeit their jobs or to incriminate themselves constituted coercion. Pp. 496-498.

(b) Whether there was a "waiver" is a federal question. P. 498.

(c) Where the choice is "between the rock and the whirlpool" (*Frost Trucking Co.* v. *Railroad Comm'n,* 271 U.S. 583, 593), the decision to "waive" one or the other is made under duress. P. 498.

Appeal dismissed and certiorari granted; 44 N.J. 209, 207 A. 2d 689; 44 N.J. 259, 208 A. 2d 146, reversed.

Daniel L. O'Connor argued the cause for appellants. With him on the brief was *Eugene Gressman.*

Alan B. Handler, First Assistant Attorney General of New Jersey, argued the cause for appellee. With him on the brief were *Arthur J. Sills,* Attorney General, and *Norman Heine.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellants were police officers in certain New Jersey boroughs. The Supreme Court of New Jersey ordered that alleged irregularities in handling cases in the municipal courts of those boroughs be investigated by the Attorney General, invested him with broad powers of inquiry and investigation, and directed him to make a report to the court. The matters investigated concerned alleged fixing of traffic tickets.

Defendant's Exhibit 10

Before being questioned, each appellant was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office.[1]

Appellants answered the questions. No immunity was granted, as there is no immunity statute applicable in these circumstances. Over their objections, some of the answers given were used in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws. Appellants were convicted and their convictions

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[1] "Any person holding or who has held any elective or appointive public office, position or employment (whether state, county or municipal), who refuses to testify upon matters relating to the office, position or employment in any criminal proceeding wherein he is a defendant or is called as a witness on behalf of the prosecution, upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself or refuses to waive immunity when called by a grand jury to testify thereon or who willfully refuses or fails to appear before any court, commission or body of this state which has the right to inquire under oath upon matters relating to the office, position or employment of such person or who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself, shall, if holding elective or public office, position or employment, be removed therefrom or shall thereby forfeit his office, position or employment and any vested or future right of tenure or pension granted to him by any of this state provided the inquiry relates to a matter which occurred or arose within the preceding five years. Any person so forfeiting his office, position or employment shall not thereafter be eligible for election or appointment to any public office, position or employment in this state." N. J. Rev. Stat. § 2A:81-17.1 (Supp. 1965).

were sustained over their protests that their statements were coerced,[2] by reason of the fact that, if they refused to answer, they could lose their positions with the police department. See 44 N. J. 209, 207 A. 2d 689, 44 N. J. 259, 208 A. 2d 146.

We postponed the question of jurisdiction to a hearing on the merits. 383 U.S. 941. The statute whose validity was sought to be "drawn in question," 28 U. S. C. § 1257 (2), was the forfeiture statute.[3] But the New Jersey Supreme Court refused to reach that question (44 N. J., at 223, 207 A. 2d, at 697), deeming the voluntariness of the statements as the only issue presented. *Id.*, at 220-222, 207 A. 2d, at 695-696. The statute is therefore too tangentially involved to satisfy 28 U. S.C. § 1257 (2), for the only bearing it had was whether, valid or not, the fear of being discharged under it for refusal to answer on the one hand and the fear of self-incrimination on the other was "a choice between the rock and the whirlpool"[4] which made the statements products of coercion in violation of the Fourteenth Amendment. We therefore dismiss the appeal, treat the papers as a petition for certiorari (28 U.S.C. § 2103), grant the petition and proceed to the merits.

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[2] At the trial the court excused the jury and conducted a hearing to determine whether, *inter alia*, the statements were voluntary. The State offered witnesses who testified as to the manner in which the statements were taken; the appellants did not testify at that hearing. The court held the statements to be voluntary.

[3] N. 1, *supra*.

[4] *Stevens* v. *Marks*, 383 U.S. 234, 243, quoting from *Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593.

Defendant's Exhibit 10

We agree with the New Jersey Supreme Court that the forfeiture-of-office statute is relevant here only for the bearing it has on the voluntary character of the statement used to convict petitioners in their criminal prosecutions.

The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under *Chambers* v. *Florida,* 309 U. S. 227, and related cases can be "mental as well as physicial"; "the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama,* 361 U.S. 199, 206. Subtle pressures (*Leyra* v. *Denno,* 347 U.S. 556; *Haynes* v. *Washington,* 373 U.S. 503) may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his "free choice to admit, to deny, or refuse to answer." *Lisenba* v. *California,* 314 U.S. 219, 241.

We adhere to *Boyd* v. *United States,* 116 U.S. 616, a civil forfeiture action against property. A statute offered the owner an election between producing a document or forfeiture of the goods at issue in the proceeding. This was held to be a form of compulsion in violation of both the Fifth Amendment and the Fourth Amendment. *Id.,* at 634-635. It is that principle that we adhere to and apply in *Spevack* v. *Klein, post,* p. 511.

The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in *Miranda* v. *Arizona,* 384 U.S. 436, 464-465, is "likely to exert such pressure upon an individual as to

disable him from making a free and rational choice." We think the statements were infected by the coercion [5] in-

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[5] Cf. Lamm, The 5th Amendment and Its Equivalent in Jewish Law, 17 Decalogue Jour. 1 (Jan.-Feb. 1967):

"It should be pointed out, at the very outset, that the Halakhah does not distinguish between voluntary and forced confessions, for reasons which will be discussed later. And it is here that one of the basic differences between Constitutional and Talmudic Law arises. According to the Constitution, a man cannot be compelled to testify against himself. The provision against self-incrimination is a privilege of which a citizen may or may not avail himself, as he wishes. The Halakhah, however, does not permit self-incriminating testimony. It is inadmissible, even if voluntarily offered. Confession, in other than a religious context, or financial cases completely free from any traces of criminality, is simply not an instrument of the law. The issue, then, is not compulsion, but the whole idea of legal confession.

* * *

"The Halakhah, then, is obviously concerned with protecting the confessant from his own aberrations which manifest themselves, either as completely fabricated confessions, or as exaggerations of the real facts. . . . While certainly not all, or even most criminal confessions are directly attributable, in whole or part, to the Death Instinct, the Halakhah is sufficiently concerned with the minority of instances, where such is the case, to disqualify all criminal confessions and to discard confession as a legal instrument. Its function is to ensure the total victory of the Life Instinct over its omnipresent antagonist. Such are the conclusions to be drawn from Maimonides' interpretation of the Halakhah's equivalent of the Fifth Amendment.

"In summary, therefore, the Constitutional ruling on self-incrimination concerns only forced confessions, and its restricted character is a result of its historical evolution as a civilized protest against the use of torture in extorting confessions. The Halakhic ruling, however, is much broader and discards confessions in toto, and this because of its psychological insight and its concern for saving man from his own destructive inclinations." *Id.*, at 10, 12.

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herent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions.

It is said that there was a "waiver." That, however, is a federal question for us to decide. *Union Pac. R.R. Co.* v. *Pub. Service Comm.*, 248 U.S. 67, 69-70; *Stevens* v. *Marks*, 383 U.S. 234, 243-244. The Court in *Union Pac. R.R. Co.* v. *Pub. Service Comm.*, *supra*, in speaking of a certificate exacted under protest and in violation of the Commerce Clause, said:

> "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary. . . ." *Id.*, at 70.

Where the choice is "between the rock and the whirlpool," duress is inherent in deciding to "waive" one or the other.

> "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." *Ibid.*

In that case appellant paid under protest. In these cases also, though petitioners succumbed to compulsion, they preserved their objections, raising them at the earliest possible point. Cf. *Abie State Bank* v. *Bryan*, 282 U.S. 765, 776. The cases are therefore quite different from the situation where one who is anxious to make a clean breast of the whole affair volunteers the information.

Mr. Justice Holmes in *McAuliffe* v. *New Bedford*, 155 Mass. 216, 29 N.E. 517, stated a dictum on which New Jersey heavily relies:

Defendant's Exhibit 10

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control." *Id.*, at 220, 29 N.E., at 517-518.

The question in this case, however, is not cognizable in those terms. Our question is whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee.

We held in *Slochower* v. *Board of Education*, 350 U.S. 551, that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee:

> "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. . . . The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Id.*, at 557-558.

We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.

There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. *Western Union*

BLEED THROUGH

Defendant's Exhibit 10

Tel. Co. v. *Kansas,* 216 U.S. 1. Resort to the federal courts in diversity of citizenship cases is another. *Terral* v. *Burke Constr. Co.,* 257 U.S. 529. Assertion of a First Amendment right is still another. *Lovell* v. *City of Griffin,* 303 U.S. 444; *Murdock* v. *Pennsylvania,* 319 U.S. 105; *Thomas* v. *Collins,* 323 U.S. 516; *Lamont* v. *Postmaster General,* 381 U.S. 301, 305-306. The imposition of a burden on the exercise of a Twenty-fourth Amendment right is also banned. *Harman* v. *Forssenius,* 380 U.S. 528. We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

Reversed.

APPENDIX 9

Transcript of Mr. Nickels' Grand Jury Testimony, August 29, 1972

(Government's Exhibit 1)

CHARLES G. NICKELS, having been first duly sworn by the Foreman to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Examination

By Mr. Webb:

Q. Will you please state your full name and spell your last name for the Grand Jury reporter?

A. My name is Charles G. Nickels, N-i-c-k-e-l-s.

Q. And what is your address, Mr. Nickels?

A. 5458 North Magnolia.

Q. Sir, at this time I would like to advise you that this is a federal grand jury investigating possible violations of certain federal criminal laws. Specifically, this Grand Jury is investigating possible violations of Title 18, United States Code, Section 1951, which is the federal extortion statute. Do you understand that?

A. Yes; is that the one they call the Hobbs Act?

Q. The Hobbs Act.

A. As much as I know about it, I think I do.

Q. You understand that this is a federal grand jury?

A. Right.

Q. Now, sir, I would like to advise you at this time that under the Fifth Amendment to the United States Constitution you have the right to remain silent. That is to say, you have the right to refuse to answer any question, the answer to which you feel may tend to incriminate you.

Now, if you do answer questions and supply this Grand Jury with information, any testimony and any informa-

tion you supply to this Grand Jury can be used against you in subsequent criminal proceedings or other proceedings.

Now do you understand your rights in connection with the Fifth Amendment?

A. I do.

Q. Sir, I would like to further advise you that under the Sixth Amendment to the United States Constitution you have the right to retain an attorney and consult with that attorney prior to giving any testimony before this Grand Jury.

Now, because of the nature of grand jury proceedings, your attorney cannot be with you in the Grand Jury Room. However, you can leave the Grand Jury Room at any time to consult with that attorney. And you certainly can consult with him prior to giving any testimony here today. Do you understand that?

A. Yes.

Q. Sir, if you could not afford an attorney, the court of this jurisdiction would appoint an attorney for you to represent you, and you can consult with that attorney prior to giving any testimony here today and you can consult with him during the testimony. Do you understand that?

A. Right.

Q. Have you retained an attorney?

A. No.

Q. Have you consulted with an attorney?

A. No.

Q. Sir, can you afford an attorney?

A. I don't really know. I don't know what one would cost.

Q. Are you willing to give testimony before this Grand Jury without consulting an attorney?

A. Repeat that, I missed the first part of it.

Q. Are you willing to give testimony before this Grand Jury at this time without consulting an attorney?

A. Yes, yes.

Q. Sir, what is your present occupation?

A. I work for the Intelligence Department of the Chicago Police Department.

Q. Sir, do you know your Social Security number?

A. It is 351-05-1479, I believe. I don't have my card with me so I couldn't swear to the last two numbers.

Q. Will you look on your driver's license?

A. Is it on my driver's license—then we will find it. It is 351-05-1479.

Q. How long have you been employed by the Chicago Police Department?

A. Since 1959.

Q. What is your present rank with the Chicago Police Department?

A. Sergeant.

Q. And you are presently assigned to the Intelligence Division?

A. Yes.

Q. How long have you been assigned to that section?

A. I have been there twice now. The last time was a year and a half.

Q. And prior to going into the Intelligence Division, what was your assignment with the Chicago Police Department, where were you assigned?

A. In the Internal Intelligence Section, which was called the IID and is called the IAD now, for approximately one year.

Q. What were your duties while you were assigned to IAD?

A. Just an investigator, investigating complaints.

Government's Exhibit 1

Q. Were you investigating complaints against other Chicago policemen?

A. That's right, sir.

Q. Did you sometimes investigate complaints that other Chicago policemen were taking money from motorists or bar owners or other people?

A. I believe I have to say "Yes;" I can't recall, but that was mainly our investigation and I would say "Yes" in that case.

Q. Before being assigned to IAD, what was your assignment with the Chicago Police Department?

A. I was in Intelligence again.

Q. For how long a period of time?

A. Oh, approximately three years.

Q. Now, about when would that have been when you went into the Intelligence Division? Would that be about 1967 or 1966?

A. I would say it would be either the end of 1966 or the beginning of 1967.

Q What was your assignment with the Chicago Police Department right before that?

A. I was in the 19th District right before then.

Q. How long were you in the 19th District?

A. Almost a year.

Q. And what district were you in prior to going to the 19th District?

A. The 18th District.

Q. And how long were you assigned to the 18th Police District?

A. I went in there when 35 and 36 merged. Do you mind if I talk to myself?

Q. No.

A. I went in there when 35 and 36 merged, which I believe was in 1960. And I was there until I left, which was about 1966 or 1967.

Government's Exhibit 1

Q. While you were assigned to the 18th Police District, were you assigned to any specific squad? Well, strike that.

Were you ever assigned to the Vice Squad while you were at the 18th District?

A. Yes, I was.

Q. How long were you assigned to the Vice Squad?

A. This is strictly a guess, but I think it was two years, probably a full two years.

Q. What two years would that have been?

A. Well, I was on the Vice Squad part of 1964, all of '65 and I think part of '66.

Q. And you left the 18th Police District in 1966, is that correct?

A. I really don't know unless I would see a record on that. But I think I did, I think I did.

Q. When you left the 18th District, were you still assigned to the Vice Squad at the time you left?

A. Right. I asked for a transfer because Commander Holzman came in. And I stayed with him for a month and then I asked for a transfer to the 19th District.

Q. And Commander Holzman replaced what Commander?

A. He replaced Captain Maurovich.

Q. And how long was Captain Maurovich Commander of the 18th Police District?

A. I would say close to two full years.

Q. Do you know what assignment he got after he left the 18th Police District, to the best of your knowledge?

A. I don't remember what district or anything he got, but I think he was assigned as a watch commander if I am not mistaken.

Q. He was demoted then, is that correct?

A. Yes, to the best of my knowledge he was.

Government's Exhibit 1

Q. Do you know why he was demoted?

A. No, sir, not really, except it was for the best of the service, that is the way it came out in the paper.

Q. Did you hear any rumors among the men as to why he was demoted?

A. Not really, because when he was demoted everybody disappeared. I was the only one left in the station, along with one other fellow.

Q. The entire Vice Squad disappeared, didn't they?

A. Just about, yes, just about completely.

Q. Do you recall the names of the men on the Vice Squad who were still with you when Captain Maurovich left the district?

A. I think I do know. There was one man there and he is retired since, and I think his name was Mazer if I am not mistaken.

Q. Joe Mazer?

A. Mazer, I don't know if his name was Joe, but it was Mazer.

Q. Do you recall if a Mr. Jake Loffler was there or did he leave?

A. He worked with Mazer but he retired then, I think. Yes, right then he retired, I think.

Q. Did you know why all these policemen suddenly disappeared from the Vice Squad at that time?

A. Truthfully, no, I do not know myself.

Q. But you remained there one more month, is that correct?

A. Yes, I did.

Q. And why did you transfer out of the 18th?

A. Well, in so many words, I just got tired of the 18th District. It seems as though every time somebody in the 18th District was working there, all of a sudden, Bingo, a new commander moves in and you don't know where you are.

Government's Exhibit 1

Q. I take that to mean you got along with Captain Maurovich better than Captain Holzman, or at least you thought that was the way it would work?

A. I thought so, yes.

Q. When Captain Maurovich was there, you got along with him fairly weli, is that correct?

A. I only talked to him about twice, I think, really. But let's put it this way, I did get along with him because I wasn't in contact with him. Maybe I would have clashed if I had been in contact with him.

Q. You only saw him twice during the entire time he was commander?

A. No, I wouldn't say that, but just figuratively speaking, I mean I only saw him one or two times to where he actually talked to me and actually asked me about something.

Q. When Holzman came in, you anticipated not getting along with him as well, is that correct; was that the reason you transferred?

A. Well, he told me, well, he didn't tell me personally, but he told his sergeant that he was bringing in all of his own men. And so I just put in for a transfer for myself when I had the chance and I left.

Q. So you went to the 19th then?

A. The 19th.

Q. On the Vice Squad?

A. No, I went just as a beat patrolman to the 19th.

Q. While you were on the Vice Squad, did you know a man named Skippy Cello?

A. I know Skippy Cello, but Skippy Cello was not on the Vice Squad that I know of when I was on Vice.

Q. What was he doing at that time?

A. That would have to be another guess, sir. I know he wasn't uniform, but I really don't know what he was doing.

Government's Exhibit 1

Q. Did you know a man by the name of Sol Mascolino?

A. Oh, yes, I know him.

Q. And was he assigned to the Vice Squad?

A. I don't believe so at that time. I don't believe he was.

Q. Was he ever assigned to the Vice Squad to the best of your knowledge?

A. He was under the previous commander, which was Commander McDermott.

Q. But when you were on the Vice Squad in 1964, '65 and '66, Mr. Mascolino was not on the Vice Squad?

A. I would have to say, no. Because I worked days all the time and it's possible he worked nights, but I would still know if he worked there and I say, no, he didn't work there, not on Vice. I am not even sure that he was in the station then.

Q. Did you know a person by the name of Harold Jackenowski?

A. Yes, the big fellow.

Q. Did you know a person by the name of Carl Flagg?

A. Yes.

Q. Did you know a person by the name of Rockford Strugell?

A. I think I know who you are referring to, but his name isn't Strugell, I don't think.

Q. You don't recall that Rockford Strugell was assigned to the Vice Squad?

A. No.

Q. What shift or watch were you working?

A. I worked by myself, strictly days.

Q. And what was your job, position or function?

A. I was mostly with call girls or prostitution.

Q. Was that undercover work?

A. Right. When I had something solid, then I would move on it.

Government's Exhibit 1

Q. But you never worked with a partner?

A. I worked with most of the fellows who worked days, I think, who were Dawson—now Loffler and Mazer were never used, I think they were too old or something for that work. I would have to stop and think, but when I had something I would come into the station and whoever was there would be what we would call the trick, and they would move with me on my information.

Q. What other vice officers do you recall who were assigned to the same watch you were who were on the vice squad in the 18th when you were there?

A. I remember Dawson and I remember Loffler and Mazer, the two older fellows. Now give me a few minutes. Did you say days?

Q. The day watch that you were on.

A. The day watch—there was McShane.

Q. Charles Dushane?

A. I know Charles Dushane, but I know him because he was a legend in that district so far as being there for quite a while.

Q. And did you know a person by the name of Marty Naughton?

A. I knew Marty Naughton, and I am almost positive he worked nights.

Q. Which Vice officers did you work with that you knew best in the 18th District?

A. The only ones that I can remember would be McShane and this Dawson, because he was always there every day, and Mazer and Loffler I would have to say I worked with them because they were in the station at the same time I was, and they were also working prostitution as a team themselves.

Q. Did Dawson work with you on making prostitution arrests?

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Government's Exhibit 1

A. If he was there, but he would never make the arrests for some reason or other. It would usually be McShane.

Q. Was there some reason why Dawson wouldn't make an arrest?

A. Not that I know of, but he seemed to be the guy who would walk around in a suit for some reason or other, if you can picture what I mean.

There was a fellow by the name of Lavin, too, who worked Vice on days when I was there.

Q. Now, sir, while you were in the 18th Police District, assigned to the Vice Squad, did you ever ask or demand money from any bar owners, tavern owner or other businessman who owned an establishment that served alcoholic beverages?

A. I did not, sir, I never did.

Q. Did you ever receive any money while you were in the 18th District from any bar owner, tavern owner or businessman who ran an establishment that sold alcoholic beverages?

A. No, sir, I did not.

Q. While you were in the 18th Police District did you ever receive any money from any other Chicago policeman, knowing that money came from a bar or tavern or business establishment that served alcoholic beverages?

A. No, I did not.

Q. In your entire career with the Chicago Police Department have you ever asked or demanded any money from any person?

A. No, I have not.

Q. While you have been employed by the Chicago Police Department, have you ever received any money from any person while you were performing your official duties as a Chicago policeman?

A. No, sir, not for my duties.

Q. Although you did receive money out of the contingency fund?

A. I have received money from the contingency fund, whatever it would cost me for a hotel room or something for prostitution.

Q. And that would be supplied by the Vice Coordinator, wouldn't it; is that generally the procedure?

A. We had a special form we filled out as to what we spent and then we would get it back. And I assume he turned it into the office.

Q. While you were in the 18th Police District, did you ever hear any rumors that members of the Vice Squad were taking money or shaking down bar owners or tavern owners?

A. Not that they were shaking them down. I have heard stories in every department I have worked in, you know.

Q. Specifically in the 18th, did you hear stories that members of the Vice Squad were taking money from bar owners?

A. No, I never was in the station enough to talk.

Q. Did you ever hear any rumors or conversations that members of the Vice Squad were splitting up a sum of money each month called "the package"?

A. I have heard that in every district I have ever been in. I don't know how to answer your questions. I have heard of that rumor, you know.

Q. Did you hear that as a rumor in the 18th Police District to the best of your recollection?

A. No, to the best of my recollection I never heard of a package there, no.

Q. Did you ever hear the term "club" used?

A. No.

BLEED THROUGH

Q. You never heard that?

A. No.

Q. Have you ever heard the term "the club" or a similar term used to refer to a group of bars that were paying off Chicago policemen for protection and to avoid harassment?

A. No, sir, I did not, because as I say, I worked by myself and it was all days. I don't smoke or drink. Smoke drives me crazy, and that was one of the reasons they put me on prostitution.

Q. Now, while you were working prostitution, did anyone ever offer you any money to forego making an arrest, et cetera?

A. Never.

Q. Since you have been employed by the Chicago Police Department, have you ever been offered any money by any person to avoid making an arrest or performing your official duties?

A. Not to the best of my recollection, no.

Q. While you have been employed in the 18th Police District or while you were employed there, did you ever see any vice officer receive an envelope which contained money?

A. No, I didn't.

Q. Did you hear rumors that there were envelopes being handed out by someone in the Vice Squad and this money was being split among all members of the Vice Squad?

A. No, I didn't, I was excluded or something, and truthfully, I didn't hear that.

Q. Did you hear any rumors about it?

A. No.

Mr. Webb: I have no further questions. Are there any questions from the Grand Jury?

Mr. Davidson: I have a few questions.

Government's Exhibit 1

By Mr. Davidson:

Q. Officer, what are your duties now in the Intelligence Division?

A. I am an investigator, supervising sergeant.

Q. You are in the Organized Crime Section?

A. Yes, I am.

Q. Who is your immediate supervisor?

A. Lt. Mike O'Donnell.

Q. When you were in the 18th Police District, did you ever receive any money from fellow officers?

A. No, I didn't.

Q. If I were to tell you that evidence has been secured by the federal government relative to your receiving moneys from other police officers, would you say that information was incorrect and false?

A. I would say it is incorrect and false, sir.

Q. In the 18th Police District, moneys were regularly picked up from businessmen in the 18th Police District. You know that, don't you, sir?

A. No, sir, I don't; to the best of my recollection I do not.

Q. You do not know that?

A. I do not know that.

Q. And isn't it a fact that during the time you were in the 18th Police District that each member of the Vice Squad shared in the money so collected from the businessmen in the 18th Police District; don't you know that?

A. Not to my recollection, sir. No, I don't know that.

Q. Are you telling this Grand Jury that you never received any moneys from any other police officer, well knowing at the time that the moneys he was giving you had been collected from businessmen in the 18th Police District?

A. I am saying that, sir. I am telling you and the Grand Jury both that I did not.

BLEED THROUGH

Government's Exhibit 1

Q. And in the 18th Police District, while you were assigned there, are you telling this Grand Jury that you were totally unaware of any other police officer who accepted moneys from other police officers, well knowing that the moneys they were receiving from the other police officers had come from businessmen in that district?

A. I am totally unaware of that because nobody ever told me that was going on.

Q. And you didn't know yourself that it was going on?

A. I didn't know that it was going on.

Q. How did you happen to get into the Intelligence Division for Mike O'Donnell?

A. Well, I wasn't there with Mike O'Donnell at first. It was when Captain Sheehan was in charge of Intelligence. As I said, I have been there twice. And I was there for about possibly two or two and a half years and then I was promoted. And when I was promoted, I was sent to the IID which is now the IAD. And then later on, apparently I had a decent record and I asked Mike O'Donnell if I could work for him, and he said yes, at the first opening. And then I was transferred back into the Intelligence Division.

Mr. Davidson: I have nothing further.

Mr. Webb: Any questions from the Grand Jury?

The Foreman: No further questions, Mr. Attorney.

Mr. Webb: Mr. Foreman, would you please continue this witness' subpoena generally?

The Foreman: Sergeant Nickels, your subpoena will be continued generally, which means that if we wish you back before the Grand Jury, we can notify you by telephone or letter without issuing a new subpoena.

The Witness: This one will be continued, I understand.

The Foreman: You may be excused.

The Witness: Thank you.

(Witness excused.)

BLEED THROUGH

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-735

CHARLES G. NICKELS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his grand jury testimony should have been suppressed at trial on the grounds that it was the product of duress and that he was inadequately warned of his rights prior to testifying.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of making a false declaration before the grand jury, in violation of 18 U.S.C. 1623, and was sentenced to a term of 18 months' imprisonment. The court of appeals affirmed, 502 F. 2d 1173 (Pet. App. 1-8). A petition for rehearing was denied on November 1, 1974 (Pet. App. 9). The petition for a writ of certiorari was not filed until December 11, 1974, and is therefore out of time under Rule 22(2) of the Rules of this Court.

The evidence showed that petitioner testified before the grand jury that he had never received any money from any persons during the performance of his duties as a police officer (Pet. App. 34-38). At his subsequent trial, however, two fellow officers, Joseph Dawson and John Cello, testified that between 1965 and 1966 they and petitioner had collected money from individuals engaged in illegal activities.

From April 1965 until approximately April 1966, Dawson, Cello, and petitioner were assigned to Chicago's 18th Police District[1] (Tr. 33-35, 168).[2] Dawson acted as conduit for a portion of "the package," a sum of money paid to vice squad officers monthly for allowing infractions to exist in the District (Tr. 36). Dawson picked up the pay-offs from gambling establishments, while Cello collected money from bars and taverns in the 18th District (Tr. 185). The total monthly collection of about $2,400 was then divided by petitioner, Cello, and Dawson for subsequent distribution among the sixteen members of the Vice Squad in that District (Tr. 185, 190).

Prior to petitioner's grand jury testimony, counsel for the government had explained the purpose of the grand jury to petitioner and warned him of his rights as follows (Pet. App. 25-26):

> Q. Sir, at this time I would like to advise you that this is a federal grand jury investigating

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[1]Petitioner and Dawson were assigned as partners to the Vice Squad, while Cello worked in the "crime car."

[2]"Tr." designate the transcript of the trial in the district court which is lodged with the Clerk of this Court.

possible violations of certain federal criminal laws. Specifically, this Grand Jury is investigating possible violations of Title 18, United States Code, Section 1951, which is the federal extortion statute. Do you understand that?

A. Yes; is that the one they call the Hobbs Act?

* * * * *

Q. Now, sir, I would like to advise you at this time that under the Fifth Amendment to the United States Constitution you have the right to remain silent. That is to say, you have the right to refuse to answer any question, the answer to which you feel may tend to incriminate you.

Now, if you do answer questions and supply this Grand Jury with information, any testimony and any information you supply to this Grand Jury can be used against you in subsequent criminal proceedings or other proceedings.

Now do you understand your rights in connection with the Fifth Amendment?

A. I do.

* * * * *

1. Petitioner contends that because his grand jury testimony was given under the duress created by Rule 51 of the Chicago Police Department, which prohibits police officers from failing to give evidence before a grand jury by claiming their privilege against self-incrimination,[3] he should have been allowed to introduce

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[3]Rule 51 states as grounds for administrative proceedings against police officers the following (Pet. App. 12):

Failing to give evidence before the Grand Jury, Coroner's inquest, in court, or before any governmental administrative

at trial evidence about this Rule and other related evidence on the issue of duress. As the court of appeals held, however, duress is a defense only if the defendant reasonably feared immediate death or serious bodily injury that could be avoided only by committing the criminal act charged. Such was not the situation in the instant case (Pet. App. 5-6).[4]

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body, including the Police Board, when properly called upon to do so, or refusing to testify on the grounds that such testimony might incriminate the member, or refusing to sign a waiver of immunity when requested to do so by a superior officer.

At the time of petitioner's grand jury testimony, Rule 51 was still in effect. However, as a result in part of this Court's decision in *Garrity* v. *New Jersey*, 385 U.S. 493, the Seventh Circuit in *Confederation of Police* v. *Conlisk*, 489 F. 2d 891, 895, subsequently held Rule 51 invalid to the extent that it denied police officers the privilege against self-incrimination. That decision in effect invalidated Rule 51 (Pet. App. 3).

[4] Contrary to petitioner's assertion, the courts are not in conflict on this issue. In *United States* v. *Lazaros*, 480 F. 2d 174, 176-177 (C.A. 6), certiorari denied, 415 U.S. 914, on which petitioner relies, the defendant was allowed to present testimony concerning whether or not he had perjured himself before the grand jury under duress. Unlike petitioner here, however, his defense of duress entailed fear of bodily harm. In *United States* v. *Willoz*, 449 F. 2d 1321, 1325 (C.A. 5), on which petitioner also relies, the defendant willfully filed an inaccurate special wagering tax return. The court of appeals remanded the case to determine if the defendant signed the return under duress. It did not, however, suggest any criteria for determining what constitutes duress.

United States v. *Barash*, 365 F.2d 395, 401-402 (C.A. 2), 412 F. 2d 26, 30 (C.A. 2), certiorari denied, 396 U.S. 382, cited by petitioner, is likewise inapposite. There, an accountant made payments to internal revenue agents in connection with their audit of income tax returns of his clients. The agents had previously pleaded guilty to taking the bribes. The defendant contended that he paid the bribes under threat of serious economic loss. In those limited circumstances, the court stated that "if a govern-

2. Petitioner also contends that the government's warning that "any testimony and any information you supply to this Grand Jury can be used against you in subsequent criminal proceedings or other proceedings" (Pet. App. 25-26) did not take account of this Court's prior decision in *Garrity* v. *New Jersey*, 385 U.S. 493, 500, in which it was held that the threat of removal from public office to induce a witness to forego the privilege against self-incrimination renders the resulting statements involuntary and, therefore, inadmissible in the subsequent criminal proceedings. Accordingly, since the police department's Rule 51 threatened removal for failure to testify, petitioner argues that the government's warning "entrapped" him into committing perjury.

The fact that petitioner was in effect "overwarned" did not, however, "entrap" him into committing perjury. The incorrect warning simply stated one horn of a dilemma that Rule 51 would have created if valid. As the court of appeals stated, "[w]hile [the warning] probably made that apparent dilemma more salient to the witness, it does not change the nature of the witness' dilemma" (Pet. App. 4). Petitioner could have avoided the dilemma

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ment officer threatens serious economic loss unless paid for giving a citizen his due, the latter is entitled to have the jury consider this, not as a complete defense like duress but as bearing on the specific intent required for the commission of bribery." Unlike Barash, however, petitioner does not allege that he was threatened by any government official, only that he felt threatened by the existence of Rule 51. Nor does petitioner contest the finding of his intent to make false declarations before the grand jury.

Nor, finally, is *United States* v. *Knox*, 396 U.S. 77, 83, applicable on the question of duress. *Knox* merely left open the question of what elements constitute a viable claim of duress. Moreover, *Knox* involved the making of false statements on a wagering tax form; it did not involve perjury before the grand jury.

by telling the truth and subsequently moving to suppress the testimony under *Garrity, supra.* Or he could have invoked his Fifth Amendment privilege during the proceeding and subsequently challenged on Fifth Amendment grounds any administrative proceeding brought against him pursuant to Rule 51. In any event, petitioner was not free to avoid the apparent dilemma by committing perjury.

Petitioner contends that his claim of entrapment is supported by the fact that he was "treated as a target" of the investigation, he was given no indication of why he was called before the grand jury, and "he was not, unlike other policemen, previously interviewed" (Pet. 7). Petitioner does not argue, however, that at the time he was called before the grand jury he was a "putative defendant" on whom the investigation had already focused,[5] nor could he so contend, since—as he admits—at the time he testified the statute of limitations barred prosecution for the pay-offs, which occurred in 1965 and 1966 (Pet. 7). Moreover, even assuming that he was a "putative defendant," petitioner cites no authority for his implied proposition that a "putative defendant" may not be called before a grand jury, and we know of none. Nor is there any authority for claiming that an agent of the federal government is required to interview a grand jury witness prior to his appearance before the grand jury. Nor, finally, is there any basis for petitioner's contention that he was

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[5]See our Petitions for Writs of Certiorari in *United States* v. *Wong,* No. 74-635, and *United States* v. *Mandujano,* No. 74-754, which involve questions concerning the type of warnings which must be given so-called "putative defendants" before the grand jury. Petitioner in the instant case was, of course, given the full *Miranda* warnings sought by the respondents in those cases.

not told why he was called before the grand jury. Petitioner was warned prior to testifying that "this is a federal grand jury investigating possible violations of certain federal criminal laws. Specifically, this Grand Jury is investigating possible violations of Title 18, United States Code, Section 1951, which is the federal extortion statute. Do you understand that?" (Pet. App. 25). This warning adequately apprised him of the nature of the investigation and of the prosecutor's assumption that petitioner might have information that would be useful to the grand jury.

Nor, in any event, could petitioner be considered "entrapped" into committing perjury, as the concept of entrapment has been articulated by this Court. As the court of appeals stated, "[i]t was defendant's predisposition to lie his way out of his difficulties that led to this crime. The Government did not solicit or encourage perjury; at most it created a situation in which perjury appeared expedient. This is not 'so outrageous' as to bar prosecution. *United States* v. *Russell,* 411 U.S. 423, 431" (Pet. App. 5). See also *Sorrells* v. *United States,* 287 U.S. 435; *Sherman* v. *United States,* 356 U.S. 369.

Moreover, even assuming that petitioner was somehow compelled to incriminate himself in violation of his Fifth Amendment privilege, that does not bar a perjury prosecution for false testimony before the grand jury. *United States* v. *Devitt,* 499 F. 2d 135, 141-142 (C.A. 7); *United States ex rel. Annunziato* v. *Deegan,* 440 F. 2d 304, 306 (C.A. 2); *United States* v. *Knox,* 396 U.S. 77. "[T]he immunity afforded by the constitutional guarantee [against compulsory self-incrimination] relates to the past and does not endow the person who testifies with a license to commit perjury." *Glickstein* v. *United States,* 222 U.S. 139, 142. Perjurious testimony directly obstructs the

grand jury's broad investigative authority. "Our legal system provides methods for challenging the Government's right to ask questions [before a grand jury]—lying is not one of them." *Bryson* v. *United States*, 396 U.S. 64, 72.

We believe that the court of appeals was thus clearly correct in holding in the instant case that, even if petitioner was in some sense improperly pressured into testifying before the grand jury (by means not amounting to "duress"), his perjury is not thereby excused, and his false testimony is not subject to suppression in a perjury prosecution. As the court recognized (Pet. App. 5), however, this portion of its holding is seemingly in conflict with holdings of the Fifth Circuit in *United States* v. *Mandujano*, 496 F. 2d 1050, and *United States* v. *Rangel*, 496 F. 2d 1059, which allow a perjurer to obtain suppression of his grand jury testimony in a perjury prosecution because he had been "improperly compelled" to testify by not receiving full *Miranda* warnings. We have petitioned for certiorari in *Mandujano* (No. 74-754) and in the similar case of *United States* v. *Wong*, C.A. 9, No. 74-1636, decided September 23, 1974, No. 74-635, and have indicated in our petitions that those decisions conflict in this respect with a number of cases from several circuits, including the instant case (Mandujano Pet. 18, n. 10; Wong Pet. 11, n.8)[6]

Reading this case, *Mandujano*, and *Wong* at their narrowest, a distinction could be drawn based on the fact that petitioner here was not a putative defendant (a consideration clearly irrelevant to the analysis of the court below; see Pet. App. 4) and that there was here no failure to convey *Miranda* warnings, as in *Mandujano* and in *Wong*

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[6]Copies of our petitions are being sent to petitioner's counsel.

(where the warnings were given but not understood), but a different kind of alleged impropriety. However, we believe that the approach of the Fifth and Ninth Circuits is fundamentally at odds with the Seventh Circuit's firm adherence to the principle that perjury is punishable even when done in response to improperly propounded questions. Accordingly, if this Court elects to review the issues presented in our petitions in *Mandujano* and *Wong*, we do not oppose the grant of the petition with respect to the second question.[7]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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[7] *Mandujano* and *Wong* both involve, in addition to the suppression-"entrapment" issue (turning on the proper application of this Court's *Glickstein-Knox-Bryson* line of authority) that is presented here, other questions concerning the nature of the obligations, if any, to provide warnings to grand jury witnesses and the criteria for identifying a "putative defendant." Because of the more comprehensive sweep of the issues presented in those cases, the Court may wish to hold this case pending its disposition of *Mandujano* and *Wong*.

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No. 74-735

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,

Respondent,

vs.

CHARLES G. NICKELS

Petitioner.

REPLY TO MEMORANDUM FOR THE UNITED STATES

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REPLY TO MEMORANDUM FOR THE UNITED STATES

Petitioner Charles G. Nickels herein replies to the Memorandum for the United States, which was submitted in answer to his Petition for Certiorari to the United States Court of Appeals for the Seventh Federal Circuit.

REASONS FOR GRANTING THE WRIT

1. Was The Denial Of The Opportunity To Present To The Jury The Circumstances Surrounding Petitioner's Grand Jury Testimony, Offered To Negate The Requisite Specific Intent And To Establish A Defense Of Duress, Improper?

(In Reply to Government's Memorandum, Pages 3-4)

Petitioner has contended throughout that he had a right to present to the petit jury the coercive circumstances surrounding his appearance and testimony before the grand jury, in order to negate the specific intent element of the crime charged and to establish an affirmative defense of duress. The Government has failed to respond to petitioner's contention that he was denied his right to submit evidence regarding the specific intent element of the offense. The Government's reliance upon the traditional rule that an affirmative defense exists only as to a defendant's reasonable fear of "immediate death or serious bodily injury", moreover, clearly ignores the recent judicial expansion of the traditional rule in specific intent cases to include evidence of a defendant's reasonable fear of immediate peril other than death or serious bodily injury.

In affirming the trial court's refusal to admit the evidence offered in negation of the specific intent element, the decision below is clearly in conflict with the decision in *United States* v. *Barash*, 365 F.2d 395, 412 F.2d 26 (2d Cir. 1969), *cert. denied*, 306 U.S. 832 (1969). *And see United States* v. *Ramzy*, 446 F.2d 1184 (5th Cir. 1971), *cert. denied*, 404 U.S. 992 (1971). Without commenting on *Ramzy*, the Government attempts to distinguish *Barash*

by asserting that "Petitioner [does not] contest the finding of his intent to make false declarations before the grand jury." (Memorandum, Ft. 4, Page 5). This is obscurantism, as petitioner was denied the *right* to effectively contest such a finding by the district court's refusal to allow the jury to consider the proffered evidence.

Despite the Government's attempt to distinguish the decisions cited by petitioner [1] in support of his contention that the evidence in question should also have been admitted in support of a duress defense, it seems beyond cavil that the Courts in those cases took into consideration evidence of immediate peril other than death or serious bodily injury. Admission of such evidence is clearly in accord with this Court's decision on the duress issue in *United States* v. *Knox,* 396 U.S. 77, 81-84 (1969), where the alleged duress resulted from a federal tax law obligation to provide information which would have been incriminating under state wagering laws.[2] To the same end is the Fifth Circuit's remand for a hearing on the duress issue in *United States* v. *Willoz,* 449 F.2d 1321 (5th Cir. 1971), where the alleged duress arose from circumstances surrounding the Government's obtainment of affidavits from the defendant, which did not rise to the level of fear of death or bodily injury. The decision below is in direct conflict with the Courts' reasoning in the above cases, since the "death/serious injury" element was obviously

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[1] Petition for Certiorari at Pages 5, 8; Memorandum at Ft. 4, Pages 4-5.

[2] In *Knox,* this Court stated (396 U.S. at 81):

> In choosing the third alternative, submission of a fraudulent form, [Knox] merely opted for the least of three evils, under a form of duress that allegedly makes his choice involuntary for purposes of the Fifth Amendment.

not present in either case prior to the remand of each on the issue of duress.[3] Even if those cases do not constitute a formal expansion of the traditional rule, petitioner respectfully suggests that the conflict is no less real, and that the facts underlying the present case merit review of the rule by this Court.

2. May The Government, Through Acts Of Omission And Affirmative Misstatements, Attempt To Procure False Statements Under Oath?

(In Reply to Government's Memorandum, Pages 5-9)

While compelled to concede that the government's "warning" to petitioner was substantively untrue in view of this Court's then-five year old decision in *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), the Government asserts that "[t]he incorrect warning simply stated one horn of a dilemma that Rule 51 would have created if valid." (Memorandum, Page 5). This response lacks any rational meaning: the incorrect "warning" did not state, but rather *created* for the witness an unconstitutional dilemma which the Government knew to be contrary to this Court's prior decision in *Garrity.* The Government's suggested means for petitioner's avoidance of the dilemma which the incorrect "warning" created (that he tell the truth and subsequently move to suppress under *Garrity,* or that he invoke a Fifth Amendment privilege and challenge the subsequent Rule 51 administrative proceeding) assumes that the petitioner either knew the law under *Garrity,* (he

[3] In his opinion for the Court in *Knox,* Mr. Justice Harlan suggests that the duress issue is "one that must be determined initially at trial," and not by way of a motion to dismiss the indictment. 396 U.S. at 83; *Id.* at 83, footnote 7.

did not, and had no attorney) and that he disbelieved the incorrect "warning", or assumes that petitioner was omniscient as to what the law would subsequently become.[4]

More importantly, the Government's suggested means for petitioner's avoidance of the dilemma completely ignores the Government's role in creating the dilemma. We are cognizant of the traditional view that perjurious testimony constitutes an offense against the judicial system itself and, as the Government has repeatedly stated, that the grand jury system imposes upon a witness a duty to provide truthful testimony. To the same end, it should be apparent that the Government, as the representative of the Court in grand jury proceedings, plays a critical role in preserving the integrity of that system. In this capacity, the Government must have some minimum duty to a witness in grand jury proceedings. The Government's petitions for certiorari in *Mandujano* and *Wong*,[5] cited in the instant Memorandum at Pages 6 (Ft. 5), 8, 9, acknowledge the need for this Court to review and clarify the precise nature of the Government's duty to grand jury witnesses, and specifically to those witnesses who are

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[4]At the time of petitioner's grand jury testimony, Rule 51 was in full effect. Under a later challenge, Rule 51 was declared constitutionally invalid to the extent that it denied police officers Fifth Amendment access. *Confederation of Police* v. *Conlisk*, 489 F.2d 891 (7th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974). It is clear on the record that petitioner detrimentally relied upon the incorrect "warning" as well as upon his knowledge of the summary use being made of Rule 51 at the time. *See*, Transcript of Hearing on Defendant's Pre-trial Motion, January 11, 1974 (hereinafter "1/11 Tr.") at pages 62-64, 67-68.

[5] *United States* v. *Mandujano*, No. 75-754; *United States* v. *Wong*, No. 74-635.

"putative defendants".[6] The issue raised here goes beyond any duty to give *Miranda*-type warnings, and focuses instead on the Government's more fundamental duty to preserve the integrity of the grand jury process. The question here is what deprivations, if any, must the system (and the petitioner) endure where the integrity of that system would have been preserved *but for* the Government's conduct. Hence regardless of any duty which the Government may or may not have with respect to the language and syntax of warnings given to putative defendants, the fundamental issue here remains: where, as here, the Government *chooses* to give warnings, even if under no duty to do so, may the Government disavow any obligation to be truthful. The Government's attempt to characterize their representations to petitioner as "over-

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[6] Remarkably, the Government would now seek to deny that petitioner was in fact "a putative defendant". It is worthy of note that petitioner has always contended that he was a "putative defendant" in an improper sense, that is, that he was called before the grand jury for the purpose of eliciting testimony which would provide a basis for a perjury indictment. A part of the Government's response to this contention has always been that petitioner was called in good faith before the grand jury as a "putative defendant" under a lingering conspiracy theory. Thus the Government has pointed to previous information, including witness statements, in which every member of the 18th Chicago Police District was accused of participation in some way in the activities under investigation; in those, petitioner had been specifically identified. *See, e.g.*, Defendant's Exhibit 1, 2. Similarly, at the hearing on petitioner's motion to suppress his grand jury testimony, the Government presented evidence to show that it had in fact been considering petitioner for a conspiracy indictment even though the petitioner had had no contact with the 18th Police District for more than five years. 1/11 Tr. at 29-31; 46; 50-53. At no time prior to the instant Memorandum has the Government ever contested petitioner's "putative defendant" status (*Cf.*, Appellees Br. at 12; Appellant's Br. at 29); indeed, the opinion of the Court of Appeals below presumed that petitioner was "a potential defendant." App. 4.

warnings'' is an effort to camouflage the critical and uncontroverted fact that their representations constituted affirmative and material misstatements of the petitioner's rights. This characterization indicates that the Government denies it has any duty to be truthful in any statements which it may make, gratuitously or otherwise, to a grand jury witness. Such a position suggests that a grand jury witness should not rely upon any Government statements during the course of his grand jury appearance, a proposition which is unquestionably repugnant to the integrity of the grand jury system itself and in clear contravention of the principles of fundamental fairness.

Though the issues raised in *Mandujano* and in *Wong* embrace the question raised here, it is respectfully submitted that in the event that this Court were to hold that *Miranda*-like warnings need not be given to a putative defendant, the more fundamental issue raised here is still worthy of review.[7]

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[7]As evidence of this distinction, we need only point to the Government's own distinction between *Mandujano* and the decision in *United States* v. *Rangel*, 496 F.2d 1059 (5th Cir. 1974), (a decision upon which petitioner has, since his indictment, heavily relied). In its petition for certiorari in *Mandujano*, (Petition No. 74-754 at Ft.2 Page 5) the Government states:

> "In *Rangel*, however, the warning given the witness prior to testifying involved a double negative, which made it confusing and ambiguous, and contained an implicit threat that the witness would be held in contempt if he wrongly refused to answer. *Because these factual circumstances raise a question whether Rangel may not in fact have been compelled in some significant way to testify by the form of his warning or deterred by it from invoking his privilege*, Rangel's case does not squarely present the issue we are raising and we are not petitioning in his case." (emphasis added)

CONCLUSION

For the reasons set forth above, petitioner Charles G. Nickels prays that this Court grant a writ of certiorari to review the judgment of the trial court and of the Seventh Circuit in this case.

Respectfully submitted,

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